

January 9, 2009

DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Federation of American Scientists

Date of Filing: August 15, 2007

Case Number: TFA-0221

The Federation of American Scientists (FAS) filed an Appeal from a determination that the Office of Policy & Internal Controls Management (OPICM) of the Department of Energy (DOE) issued on July 11, 2007. In that determination, OPICM denied in part a request for information that the Appellant submitted to the DOE pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552. OPICM released a redacted version of a document to FAS after determining that the original document contained classified information that should be protected from disclosure under the FOIA. This Appeal, if granted, would require the DOE to review the withheld portions of the document again for possible release. *

The FOIA requires that documents held by federal agencies generally be released to the public upon request. The FOIA, however, lists nine exemptions that set forth the types of information that may be withheld at the discretion of the agency. 5 U.S.C. § 552(b). Those nine categories are repeated in the DOE regulations implementing the FOIA. 10 C.F.R. § 1004.10(b).

I. Background

On July 6, 2005, FAS requested a copy of the National Hydro Test Plan and a chronology of all hydro tests, including date, location, weapon system, and event name from the DOE's National Nuclear Security Administration (NNSA). NNSA identified a draft of the FY 2006 National Hydro Test Plan as responsive to the request, and forwarded this document to DOE Headquarters for a declassification review. On July 11, 2007, OPICM provided FAS with a redacted draft of the FY 2006 National Hydro Test Plan. In its determination letter, OPICM explained that the withheld portions of the Plan contained information properly classified as Restricted Data or Formerly Restricted Data pursuant to the Atomic Energy Act, 42 U.S.C.

* Decisions issued by the Office of Hearings and Appeals are available on the OHA website located at <http://www.oha.doe.gov>. The text of a cited decision may be accessed by entering the case number of the decision in the search engine at <http://www.oha.doe.gov/search.htm>.

§§ 2161-2166, therefore warranting protection from disclosure under Exemption 3 of the FOIA

The present Appeal seeks a re-evaluation of the withheld material. Specifically, FAS contends that some sections of the document have been “block-deleted to an extent that suggest[s] some unclassified information may have been inadvertently withheld,” and that other deletions indicate that information has been withheld simply because it pertains to nuclear weapons, without any finding that the information is currently and properly classified. Appeal at 1. FAS also contends that item 2 of its request, in which it sought a chronology of all hydro tests, was not addressed by OPICM. Consequently, FAS also asks us to instruct NNSA to conduct a search for the requested chronology.

II. Analysis

Exemption 3 of the FOIA provides for withholding material “specifically exempted from disclosure by statute . . . provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matter to be withheld.” 5 U.S.C. § 552(b)(3); *see* 10 C.F.R. § 1004.10(b)(3). We have previously determined that the Atomic Energy Act of 1954, 42 U.S.C. §§ 2011-2296, is a statute to which Exemption 3 is applicable. *See, e.g., National Security Archive*, Case No. TFA-0115 (2006).

The Director of the Office of Security, has been designated as the official who shall make the final determination for the DOE regarding FOIA appeals involving the release of classified information. DOE Delegation Order No. 00-030.00, Section 1.8 (December 6, 2001). As the result of a reorganization within the Department, this function is now the responsibility of the Deputy Chief for Operations, Office of Health, Safety and Security (Deputy Chief). Upon referral of this appeal from the Office of Hearings and Appeals, the Deputy Chief reviewed the responsive document from which the DOE had withheld information.

According to the Deputy Chief, the DOE determined on review that, based on current DOE classification guidance, some of the material the DOE withheld from the document may now be released. The information that the DOE continues to withhold consists of Restricted Data (RD) and Formerly Restricted Data (FRD) that concerns the design or utilization of nuclear weapons. RD and FRD are forms of classified information the withholding of which is required under Atomic Energy Act of 1954, and are therefore exempt from mandatory disclosure under Exemption 3.

The denying official for the DOE’s withholdings is Mr. Michael A. Kilpatrick, Deputy

Chief for Operations, Office of Health, Safety and Security, Department of Energy. Based on the Deputy Chief's review, we have determined that the Atomic Energy Act requires DOE to continue withholding portions of the draft FY 2006 National Hydro Test Plan.

Although a finding of exemption from mandatory disclosure generally requires our subsequent consideration of the public interest in releasing the information, such consideration is not permitted where, as in the application of Exemption 3, the disclosure is prohibited by statute. Therefore, those portions of the document that the Deputy Chief has now determined to be properly classified must be withheld from disclosure. Nevertheless, the Deputy Chief has reduced the extent of the information previously deleted to permit releasing the maximum amount of information consistent with national security considerations. We will provide a copy of the newly redacted document to FAS.

With regard to FAS' other contention, the determination letter does not appear to address FAS' request for a chronology of all hydro tests. However, we have contacted NNSA, and have been informed that such a chronology does not exist. *See* December 30, 2008 e-mail from Helmut Filacchione, Stockpile Research and Development Branch, NNSA, to Robert B. Palmer, Senior Staff Attorney, OHA. The FOIA does not require an agency to create a document in response to a FOIA request, *see, e.g., Samuel D. Johnson*, Case Nos. TFA-0152, TFA-0160 (2006), and to instruct NNSA to search for a document that we have been reliably informed does not exist would be fruitless. Consequently, we will deny this portion of FAS' Appeal.

It Is Therefore Ordered That:

- (1) The Appeal filed by the Federation of American Scientists on August 15, 2007, Case No. TFA-0221, is hereby granted to the extent set forth in paragraph (2) below and denied in all other respects.
- (2) A newly redacted version of the FY 2006 National Hydro Test Plan will be provided to the Federation of American Scientists.
- (3) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

Date: January 9, 2009

Poli A. Marmolejos
Director
Office of Hearings and Appeals